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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

SUPPLEMENTARY BRIEF FOR THE RESPONDENT

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SUPPLEMENTARY BRIEF FOR THE RESPONDENT

BACKGROUND AND QUESTIONS PRESENTED

Certiorari was granted by the Court on June 17, 1968, on the following issues:

1. Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

2. If so, was the Petitioner "twice put in jeopardy" in this case?

The case was argued before the Court on December 12, 1968, and on December 16, 1968, the Court entered the following Order:

"This case is restored to the docket for reargument on March 24, 1969, limited to the following question, not specified in the original writ:

Does the 'concurrent sentence doctrine', enunciated in *Hirabayashi v. United States*, 320 U.S. 81, 105, and subsequent cases, have continuing validity in light of such decisions as *Ginsberg v. New York*, 390 U.S. 629, 633, n. 2, *Peyton v. Rowe*, 391 U.S. 54, *Carafas v. LaVallee*, 391 U.S. 234, 237-238, and *Sibron v. New York*, 392 U.S. 40, 50-58?

The Solicitor General of the United States is invited to file a brief and to participate in oral argument."

While the Supplementary Brief for the Petitioner contains two additional questions and arguments contrary to the Order of this Court, the Respondent will limit its Brief to the question propounded by the Order unless instructed otherwise by the Court.

ARGUMENT

THE CONCURRENT SENTENCE DOCTRINE, ENUNCIATED IN *HIRABAYASHI v. UNITED STATES*, 320 U.S. 81, 105, AND SUBSEQUENT CASES, DOES HAVE CONTINUING VALIDITY IN LIGHT OF SUCH DECISIONS AS *GINSBERG v. NEW YORK*, 390 U.S. 629, 633, n. 2, *PEYTON v. ROWE*, 391 U.S. 54, *CARAFAS v. LaVALLEE*, 391 U.S. 234, 237-238, AND *SIBRON v. NEW YORK*, 392 U.S. 40, 50-58.

The "concurrent sentence doctrine" enunciated in *Hirabayashi* can be traced from its origin in the common law of England through land mark decisions of this Court in the early days of our republic and the later 19th and early 20th Century to the present era.

Its progenitor was the ancient rule stated in the English case of *Regina v. Ingram*, 1 Salk. 384, (1712) and elaborated by Lord Mansfield in *Peake v. Oldham*, 1 Cowp. 275 (1775), that if there is one good count sufficient to sustain a conviction. the verdict will stand notwithstanding all the other counts are bad. The rule is based on the theory that

a court will only sentence on the valid count and disregard as surplusage any count which is invalid.

This rule was first enunciated in this Court by Chief Justice Marshall in *Locke v. United States*, 7 Cranch 339 (1812) in sustaining a libel action to condemn a confiscated cargo. The Court stated at Page 344:

> "The information consists of several counts, to all of which exceptions are taken. The court, however, is of opinion that the 4th count is good, and this renders it unnecessary to decide on the others."

In *Claasen v. United States*, 142 U.S. 140, 35 L. Ed. 966, 12 S. Ct. 169 (1891) the Court had occasion, when a general sentence on all counts was involved, to apply the rule. Justice Gray, speaking for the majority of the Court, stated at Page 146 of 142 U.S.:

> "This count and the verdict of guilty returned upon it being sufficient to support the judgment and sentence, the question of the sufficiency of the other counts need not be considered.
>
> "In criminal cases the general rule, as stated by Lord Mansfield before the Declaration of Independence is that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. *Peake v. Oldham*, Cowp. 275, 276; *Rex v. Benfield*, 2 Burr, 980, 985. See also *Grant v. Astle*, 2 Dougl. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because in absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

Later, the Court elucidated the rule that if the sentence did not exceed the maximum penalty which might have

been exacted under the good count standing alone, the invalid count did not warrant reversal. *Whitfield v. Ohio*, 297 U.S. 431, 80 L. Ed. 778, 56 S. Ct. 532 (1936); *Sinclair v. United States*, 279 U.S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929); *Abrams v. United States*, 250 U.S. 616, 63 L. Ed. 1173, 40 S. Ct. 17 (1919); *Evans v. United States*, (2 cases) 153 U.S. 584, 595, 608, 38 L. Ed. 830, 834, 839, 14 S. Ct. 934, 939 (1894).

Pierce v. United States, 252 U.S. 239, 64 L. Ed. 542, 40 S. Ct. 205 (1919), however, was the beginning of what today is referred to as the "concurrent sentence doctrine". In that case citing *Claasen* as authority the Court refused to reverse a conviction on four counts because of the insufficiency of the first count, stating at Page 252 of 252 U.S.:

> "The conceded insufficiency of the first count of the indictment does not warrant a reversal, since the sentences imposed upon Pierce, Creo and Zeilman did not exceed that which lawfully might have been imposed under the second, third or sixth counts, so that the concurrent sentence under the first count adds nothing to their punishment. *Claasen v. United States*, 142 U.S. 140, 146, 35 L. Ed. 966, 968, 12 S. Ct. R. 169, and cases cited."

In footnote No. 1, Mr. Justice Douglas delivering the opinion of the Court in *Pinkerton v. United States*, 328 U.S. 640, 642, 90 L. Ed. 1489, 66 S. Ct. 1180 (1945), makes the point that the same rule applied in *Claasen* obtains in the case of concurrent sentences and cites *Hirabayashi*.

Pierce was followed by *Rae v. Brooks*, 267 U.S. 432 69 L. Ed. 699, 45 S. Ct. 345 (1924) where the Court found it unnecessary to pass on a question involving a second count on which the Petitioner received a sentence concurrent with the First Count because ". . . the conviction can be sustained on the first count . . . there is no ground for

reversing the case because of error in charging as to the second count." The Court reached the same results under substantially similar circumstances in *Gorin v. United States*, 312 U.S. 19, 85 L. Ed. 488, 61 S. Ct. 617 (1940).

The "concurrent sentence doctrine" was thus well-established when the Court rendered its opinion in *Hirabayashi* on June 21, 1943. There the Petitioner was indicted under an Act of Congress allowing, inter alia, an Executive Order to authorize military commanders to designate certain zones as military areas and to issue regulations governing these areas. Petitioner was indicted on two counts, (1) failure to report to a designated civilian central area for evacuation; and (2) failure to remain in his residence located in a designated military area between 8:00 P.M. and 6:00 A.M. He was found guilty on both counts and sentenced to three months on each count to run concurrently. After a lengthy discussion of the scope of the war clause, the lack of equal protection clause in the Fifth Amendment, and the legality of the delegation of legislative power to the Executive Branch the Court affirmed as to the Second Count.

As to the First Count Mr. Chief Justice Stone, speaking for the majority of the Court stated at Page 85 of 320 U.S.:

> "Since the sentences of three months each imposed by the District Court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised with respect to the First Count if we find that the conviction on the Second Count for violation of the curfew order must be sustained."

The Circuit Courts of Appeals had occasion to apply the "doctrine" prior to 1943,[1], but it was after *Hirabayashi* that

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[1] *Haynes v. United States*, 101 F. 817 (C.A. 8, 1900); *Jarvis v. United States*, 90 F. 2d 243 (C.A. 1, 1937); *Giugm, et al. v. United States*, 127 F. 2d 786 (C.A. 1, 1942).

the Courts began to recognize the great usefulness of the "doctrine" and applied it with consistency.[2] It has also been utilized by State jurisdictions.[3]

This Court has reiterated the "doctrine" in *Flournoy v. Wiener*, 321 U.S. 253, 88 L. Ed. 708, 64 S. Ct. 548 (1943); *Pinkerton v. United States*, *supra*; *United States v. Sheridan*, 329 U.S. 379, 91 L. Ed. 359, 67 S. Ct. 332 (1946); *Rovicaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957); *Lawn v. United States*, 355 U.S. 359, 2 L. Ed. 2d 321, 78 S. Ct. 311 (1958); *Greene v. United States*, 358 U.S. 326, 3 L. Ed. 2d 340, 79 S. Ct. 340 (1959); *United States v. Romano*, 382 U.S. 136, 15 L. Ed. 2d 210, 86 S. Ct. 279 (1965); *United States v. Gainey*, 380 U.S. 63, 13 L. Ed. 2d 658, 85 S. Ct. 754 (1965).

In *Lanza v. State*, 370 U.S. 139, 8 L. Ed. 2d 384, 82 S. Ct. 1218 (1962) the Court refused to reverse a conviction in which all sentences were made concurrent and only two counts out of 19 were found to be valid. As recently as

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[2] *O'Malley v. United States*, 227 F. 2d 332 (C.A. 1, 1955); *United States v. Gordon*, 379 F. 2d 790 (C.A. 2, 1967); *Barnes v. United States*, 381 F. 2d 265 (D.C. Cir. 1967); *Green v. United States*, 383 F. 2d 202 (D.C. Cir. 1967); *United States v. Butenko*, 384 F. 2d 565 (C.A. 3 1967); *United States v. Jacobs*, 386 F. 2d 172 (C.A. 4 1967); *United States v. Parsow*, 391 F. 2d 241 (C.A. 4 1968); *United States v. Harris*, 391 F. 2d 390 (C.A. 6 1968); *United States v. Wechsler*, 392 F. 2d 348 (C.A. 4 1968); *United States v. Hanna*, 393 F. 2d 703 (C.A. 5 1968); *Cribb v. United States*, 397 F. 2d 361 (C.A. 5 1968), Cert. denied Dec. 18, 1968. See generally, 11-7th Decennial Digest 695-710.

[3] *People v. Landis*, 66 Ill. App. 2d 458, 214 N.E. 2d 343 (1966); *State v. Teutsch*, 80 S.D. 462, 126 N.W. 2d 112 (1964); *Marks v. State*, 230 Md. 108, 185 A. 2d 909 (1962); *Commissioner v. Finkelstein*, 191 Pa. Super. 328, 156 A. 2d 888 (1959); *Craddock v. United States*, 153 A. 2d 699 (D.C. Mun. 1959); *Shorter v. State*, 234 Ind. 1, 122 N.E. 2d 847 (1954); *State v. Gipson*, 233 N.C. 691, 65 S.E. 2d 508 (1951); *Meade v. State*, 198 Md. 489, 84 A. 2d 892 (1951); *State v. Rogers*, 8 N.J. Super. 64, 73 A. 2d 274 (1950); *People v. Ponce*, 96 C.A. 2d 327, 215 P. 2d 75 (1950).

January 22, 1968, the members of the Court recognized the existence of the "doctrine" in *Epton v. New York*, 390 U.S. 29, 19 L. Ed. 2d 808, 88 S. Ct. 824 (1968) where in a concurring opinion denying certiorari Mr. Justice Stewart cited *Hirabayashi* as making it unnecessary to decide the validity of two of the three counts of which the Defendant had been convicted since one count was assumed valid. In a dissenting opinion in the same case Mr. Justice Douglas acknowledged the "doctrine" by denying its applicability to the facts of the case stating at page 34 of 390 U.S.:

> "Since in my opinion none of the petitioner's convictions is free of doubt . . . there is no basis for applying the rule that there is no occasion to review a conviction on one count of an indictment if the judgment on another count is valid and the sentences are concurrent."

On December 17, 1968, the Court denied certiorari where a Defendant sought review of a decision by the United States Court of Appeals Fifth Circuit which held that the Court was not required to pass on Defendant's attacks on his conviction as to three counts of a six count indictment since sentences received on the counts attacked were to run concurrently with those sentences imposed on counts as to which there was no question of guilt. *Cribb v. United States*, 37 L. W. 3219.

While the "concurrent sentence doctrine" has been an integral part of American Jurisprudence from prior to the founding of our country to the present as outlined in the preceding paragraphs, there has been very little illumination shed by the case law as to the reasons for its existence. The fact that the application of the "doctrine" has (1) conserved judicial time and effort, (2) has provided the Court with a convenient means of avoiding unnecessary questions, and (3) terminated fruitless litigation, cannot

be denied. However, the principle legal foundation of the "doctrine" would be lack of jurisdiction, to wit: once the initial determination of one valid count is made, the validity of the other count or counts become, in effect, moot questions. The lack of jurisdiction by this Court to review moot cases derives from the requirements of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case for controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964). Elaborating on this point, the Court in *Local 8-6 Oil Chemical & Atomic Workers International Union AFL-CIO, et al. v. Missouri*, 361 U.S. 363, 4 L. Ed. 2d 373, 80 S. Ct. 391 (1960), stated at Page 367 of U.S. 363:

> ". . . the duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules which cannot affect the matter in issue in the case before it" (Cases cited).

Therefore, it is urged by this Respondent that the "concurrent sentence doctrine" is applicable to the case at bar insofar as the Defendant's conviction for the crime of burglary under the first count is valid and whether or not his conviction under the third count is valid or invalid is a moot question and is not within the jurisdiction of the Court under Article III of the Constitution.

It is recognized by the Respondent that the "doctrine" is predicated on the inherent understanding that no injury be sustained by the Defendant by the Court's failure to rule on the invalid count. In *Ginsberg, Peyton, Carafas* and *Sibron* it is apparent that the Court has viewed in a new light what does or does not constitute "injury" to a Defendant as a result of a conviction. However, an examination of the facts of these cases, as well as the principles enun-

ciated therein indicates that they do not change the "concurrent sentence doctrine" per se.

The law as to when a criminal case is moot so as to preclude review of or attack on a conviction or sentence is now unsettled, with a noticeable tendency of this Court to relax rules against the review of judgment in criminal cases in certain circumstances. In the area of the doctrine that an accused who has satisfied his sentence either by serving a prison term or paying a fine renders his case moot so as to preclude review of or attack on his conviction or sentence, this Court has modified the traditional rule by permitting an accused who has satisfied his sentence to obtain review of or otherwise to challenge his conviction or sentence where he can show under either state or federal law further penalties or disabilities as a result of the judgment which has been satisfied. *St. Pierre v. United States,* 319 U.S. 41, 87 L. Ed. 1199, 63 S. Ct. 910 (1943).

This line of reasoning was followed in *Ginsberg v. New York, supra,* decided April 22, 1968, where the Defendant was indicted and convicted on two counts of selling "girlie" magazines to a minor in violation of the New York criminal obscenity statute. Although the Defendant could have been sentenced to one year imprisonment or a $500.00 fine or both, the Court suspended sentence on all counts. Under a New York statute the judge could thereafter recall Appellant and impose sentence only within one year. The judge did not do so, hence, the suspension was irrevocable. Mr. Justice Brennan, speaking for the majority of the Court, disposed of the question of mootness by way of a footnote (Footnote 2) at Page 633 of 390 U.S., stating:

> "2. The case is not moot. * * * Although *St. Pierre v. United States,* 319 U.S. 41, 87 L. Ed. 1199, 63 S. Ct. 910, held that a criminal case had become moot when the

petitioner finished serving his sentence before direct review in this Court, *St. Pierre* also recognized that the case would not have been moot had 'petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied.' Id, at 43, 87 L. Ed. at 1201. The State of New York concedes in its brief in this Court addressed to mootness 'that certain disabilities do flow from the conviction.' The brief states that among these is 'the possibility of ineligibility for licensing under state and municipal laws regulating various lawful occupations. . . .' Since the argument, the parties advised the Court that, although this is the first time appellant has been convicted of any crime, this conviction might result in the revocation of the license required by municipal law as a prerequisite to engaging in the luncheonette business she carries on in Bellmore, New York . . .'. In these circumstances the case is not moot since the conviction may entail collateral consequences sufficient to bring the case within the *St. Pierre* exception. See *Fiswick v. United States*, 329 U.S. 211, 220-222, 91 L. Ed. 196, 202, 203, 67 S. Ct. 224. We were not able to reach that conclusion in *Tannenbaum v. New York*, 388 U.S. 439, 18 L. Ed. 2d 1300, 87 S. Ct. 2107, or *Jacobs v. New York*, 388 U.S. 431, 18 L. Ed. 2d 1294, 87 S. Ct. 2098, in which the appeals were dismissed as moot. In *Tannenbaum* there was no contention that the convictions under the now repealed § 484-i entailed any collateral consequences. In *Jacobs* the appeal was dismissed on motion of the State which alleged, inter alia, that New York law did not impose 'any further penalty upon conviction of the misdemeanor here in issue.' Appellant did not there show, or contend, that his license might be revoked for 'conviction of any crime'; he asserted only that the conviction might be the basis of a suspension under a provision of the Administrative Code of the City of New York requiring the Department of Licenses to assure that motion picture theatres are not conducted in a manner offensive to 'public morals.'"

This decision is distinguishable from the "concurrent sentence doctrine" insofar as it concerns the "satisfaction of sentence doctrine" and the concession of the State of New York, to wit: (1) "that certain disabilities do follow from the conviction"; (2) among these is "the possibility of ineligibility for licensing under state and municipal laws regulating various lawful occupations . . ."; and (3) stipulation that this was the Defendant's first criminal conviction, therefore there was a greater possibility of revocation of license to operate the business under a pertinent local statute.

Shortly after *Ginsberg*, this Court had the opportunity, again, on direct review to consider the rule that satisfaction of sentence precludes review. In *Sibron v. New York*, *supra*, the accused was arrested under New York's "stop and frisk" law for possession of heroin; after reserving his right to appeal, the Defendant plead guilty after the trial court refused to suppress the evidence; he was sentenced to six months in prison; the New York Court of Appeals affirmed the conviction; and the Defendant had served his sentence before the appeal reached this Court. Noting that the case was distinguishable from *St. Pierre* in that *Sibron* "could not have brought his case to this Court for review before the expiration of his sentence" 319 U.S. at 43, Mr. Chief Justice Warren, speaking for the Court went on to expand on the principle enumerated in *St. Pierre* in concluding that the case was not moot. Recognizing that this was a jurisdictional problem the Court was of the opinion that the two exceptions to its "doctrine" of mootness as outlined in *St. Pierre* were applicable. First, a State may not effectively deny a convict access to the Courts until he has been released and then argue that his case has been moot by his failure to do what it alone prevented him from doing.

Then the Court went on to state at page 53 of 392 U.S.:

"The second exception recognized in *St. Pierre* permits adjudication of the merits of a criminal case where 'under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied.' 319 U.S., at 43. Subsequent cases have expanded this exception to the point where it may realistically be said that inroads have been made upon the principle itself. *St. Pierre* implied that the burden was upon the convict to show the existence of collateral legal consequences. Three years later in *Fiswick v. United States*, 329 U.S. 211 (1946), however, the Court held that a criminal case had not become moot upon release of the prisoner, noting that the convict, an alien, might be subject to deportation for having committed a crime of 'moral turpitude.' — even though it had never been held (and the Court refused to hold) that the crime of which he was convicted fell into this category. The Court also pointed to the fact that if the petitioner should in the future decide he wanted to become an American citizen, he might have difficulty proving that he was of 'good moral character.' *Id.* at 222.

"* * * in *Pollard v. United States*, 352 U.S. 354 (1957), the Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed. With nothing more than citations to *Morgan* and *Fiswick*, and a statement that 'convictions may entail collateral legal disadvantages in the future,' *id.*, at 358, the Court concluded that 'The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.' *Ibid.* The Court thus acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominously in the limbo of mootness.' *Parker v. Ellis*, 362 U.S. 574, 577 (1960) (dissenting opinion)."

Holding that it had jurisdiction, the Court concluded at Page 57 of 392 U.S.:

> "*St. Pierre v. United States, supra,* must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not the case here. Sibron 'has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' *Fiswick v. United States, supra,* at 222. The case is not moot."

While *Sibron* can be distinguished from the "concurrent sentence doctrine" on the facts and on the action of the State in effectively denying him access to the Courts until he had been released and then arguing that his case had been mooted by his failure to do what it alone prevented him from doing, the Court's holding "that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction" does have a qualifying effect on the "doctrine".

On May 20, 1968, this Court handed down two decisions on another aspect of the mootness doctrine dealing with the term "in custody" as set forth in the Federal Habeas Corpus Statute. 28 U.S.C. (Sections 2241, 2242, 2243, 2244, 2245, 2249, 2252 and 2254).

In *Carafas v. LaVallee, supra,* the issue presented on the "mootness" point was whether the expiration of the Petitioner's sentence before his application was finally adjudicated and while it was awaiting appellate review, terminates federal jurisdiction with respect to the application. The Court held that in light of *Ginsberg's* ruling as to "collateral consequences" the case was not moot. In overruling *Parker v. Ellis,* 362 U.S. 574, 4 L. Ed. 2d 963, 80 S. Ct.

909 (1960), which held that releasing prisoners from jail moots Habeas Corpus proceedings because the only remedy is release, the Court stated at Page 238 of 391 U.S.:

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' *Fiswick v. United States*, 329 U.S. 211, 222 (1946). On account of these 'collateral consequences,' the case is not moot." (Cases cited.)

The factual circumstances of *Carafas*, insofar as it concerns the satisfaction of sentence doctrine and more important the critical issue of the expanded interpretation of "in custody" under 28 U.S.C. Section 2243, distinguishes it from *Hirabayashi*. However, the language of the Court, in arriving at the conclusion that "he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him" must be considered in the application of the "concurrent sentence doctrine."

Peyton v. Rowe, supra, decided on the same date, May 20, 1968, as *Carafas* concerns the scope of 28 U.S.C. Section 2241(c)(3) which specifies that the United States District Courts may issue writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution . . . of the United States." The question presented was whether a District Court could entertain a petition for a writ of habeas corpus from a prisoner incarcerated under consecutive sentences who claimed that a sentence that he was scheduled to serve in the future was invalid because of a deprivation of rights guaranteed by the Constitution.

In overruling *McNally v. Hill*, 203 U.S. 131, 79 L. Ed. 238, 55 S. Ct. 24 (1934), which held that the habeas corpus statute did not authorize attacks upon future consecutive sentences, the Court maintained "that the decision on that case was compelled neither by statute nor by history and that today it represents an indefensible barrier to prompt adjudication of constitutional claims in federal courts." Mr. Chief Justice Warren, speaking for the majority of the Court, stated at page 61 of 391 U.S.:

> "The substantial issue, however, which is posed by *Parker v. Ellis*, is not mootness in the technical or constitutional sense, but whether the statute defining the habeas corpus jurisdiction of the federal judiciary in respect of persons in state custody is available here.
>
> "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed. This is required not only by the repeated references in the statute, but also by the history of the great writ. It province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person. See *Peyton v. Rowe, ante.*
>
> "But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that 'the court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244 (b) speaks in terms of 'release from custody or other remedy.' See *Peyton v. Rowe, supra; Walker v. Wainwright*, 390 U.S. ..... (1963). Cf. *Ex parte Hull*, 312 U.S. 546 (1941).
>
> "But the harshness of a rule which may delay determination of federal claims for decades becomes ob-

vious when applied to the cases of Rowe and Thacker. Their cases also exemplify the manner in which the decision in *McNally* cuts against the prior and subsequent development of the writ in the federal courts.

". . . Yet, under the current schedules of confinement, it is argued, neither Rowe nor Thacker may obtain adjudication of his claims until after 1990. By that time, dimmed memories or the death of witnesses are bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact. * * *

". . . Postponement of the adjudication of such issues for years can harm both the prisoner and the State and lessens the probability that final disposition of the case will do substantial justice. . . .

"Moreover, in arriving at its decision, the Court in *McNally* relied in part upon an unnecessarily narrow interpretation of the habeas corpus statute. Standing alone, the limitation of § 2241 (c) (3) — that '[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution' — is not free of ambiguity. However, in common understanding 'custody' comprehends respondents' status for the entire duration of their imprisonment. Practically speaking, Rowe is in custody for 50 years, or for the aggregate of his 30- and 20-year sentences. For purposes of parole eligibility, under Virginia law he is incarcerated for 50 years. Va. Code Ann. § 53-251 (1967); see n. 3, *supra*. Nothing on the face of § 2241 militates against an interpretation which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed on them."

The main thrust of *Peyton* is the Court's elucidation on the nature of the Writ of Habeas Corpus and the expanded and more enlightening interpretation of the term "in custody" as set forth in 28 U.S.C., Section 2241 (c) (3). It is logical that postponement of the adjudication of the issues for years could harm not only the prisoner, but also the

State and lessens the probability that final disposition of the case will do substantial justice.

Our review of the historical background of the "concurrent sentence doctrine" and the line of cases which punctuate its existence prior to and subsequent to *Hirabayashi*, indicate that said doctrine has continuing validity. Like an ancient and venerable tree, it has withstood the ravages of time — not growing but surviving — protected by the jurisdictional clause of the United States Constitution through the "mootness doctrine" and the practical consideration of conserving judicial time and energy. But one would be foolhardy, indeed, if he were not to recognize that in the *Ginsberg, Peyton, Carafas* and *Sibron* line of cases a storm has arisen — within the friendly environments of the new approach to the mootness doctrine — of such proportion that it could sweep the "concurrent sentence doctrine" away or at the very least reduce it to a shadow of its former self. While the *Hirabayashi* line of cases were rooted in practical consideration such as conserving judicial time and energy plus lack of real injury to the Appellant, it is apparent from *Ginsberg, Peyton, Carafas* and *Sibron* that the approach in the future should be on a case to case basis using as a measuring rod whether or not the Appellant has or will suffer "collateral legal consequences". It is evident that the exception set forth in *St. Pierre* has now become the rule. Therefore, the "concurrent sentence doctrine" should continue to have validity but limited to cases where there is no collateral legal consequences to be imposed on the basis of the challenged conviction.

Applying this limited concept of the "concurrent sentence doctrine" to the facts of the case at bar, the issue is whether the Defendant will suffer any collateral legal consequences as a result of his second conviction. The Peti-

tioner was convicted of the crime of burglary, to wit: the breaking and entering of a dwelling house in the night time with intent to steal (Article 27, Section 30 of the Annotated Code of Maryland) and of the common law crime of larceny, to wit: feloniously taking and carrying away the personal property of another with the intent to deprive the owner of the property permanently. *Fletcher v. State*, 231 Md. 191, 189 A 2d 641 (1963). Both convictions grew out of the same identical facts. While larceny is not technically a lesser included offense in the crime of burglary, for practical purposes under the circumstances of the case at bar, the evidence produced at the trial to prove the burglary proved the larceny. The Petitioner received a sentence of 15 years on the burglary count and 5 years concurrent sentence on the larceny count.

In Petitioner's Supplementary Brief at p. 8 he states that the most obvious and immediate consequence from the larceny conviction would be the length of time Petitioner would be required to serve under his conviction. Other than to quote Article 41, Section 125, Annotated Code of Maryland (1968 Cumulative Supplement) (which requires reports by the State's Attorney to the Department of Parole and Probation and the Department of Correction of the resume of facts and evidence as to each case) and to make the bald statement "It is a fair assumption that if Petitioner is serving a sentence for one rather than two convictions, he is likely to be released earlier", the Petitioner offers no supporting data or argument for his statement. Said statement under the circumstances would be mere speculation. It could be argued contrary to the Petitioner's position that the report required under Article 41, Section 125 would help rather than harm because it would undoubtedly indicate that his larceny and burglary conviction grew out of the same identical circumstances. Hence, for parole pur-

poses they could be considered to merge. When considering the criteria for parole as outlined by Article 41, Section 111, Annotated Code of Maryland (1968 Cumulative Supplement)[4] plus the policy of the Parole Board, Article 41 Section 122(a) (1968 Cumulative Supplement),[5] to consider a convict for parole after he has served one-fourth of his substantive sentence it should be obvious that Petitioner's fears are unfounded. Even the mathematics of the situation militates against the Petitioner's position. On his fifteen year sentence he would not be considered for parole until he had served one-fourth of his term or three years 9 months less good time. Under his five year sentence if it were not concurrent he would be eligible for parole after one year three months less good time. While it is true his burglary conviction increases, the time the Defendant will serve on his concurrent larceny conviction,

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[4] Article 41, Section 111. Duties of Board (Parole) provides in pertinent part:

"It shall be the duty of the Board in carrying out its powers authorized herein:

(1) In determining whether a prisoner is suitable for release on parole:

(I) To consider the circumstances surrounding the crime, and the physical, mental and moral qualifications of persons who become eligible for parole;

(II) To determine whether there is reasonable probability that the prisoner, if released on parole, will remain at liberty without violating the laws, and whether the release of the prisoner on parole is compatible with the welfare of society; * * *."

[5] Article 41, Section 122(a), entitled investigation to determine advisability of parole provides:

"(a) It shall be the duty of the Board of its own initiative to request the Department to make such investigation as may enable the Board to determine the advisability of granting parole to persons sentenced under the laws of this State, to the jurisdiction of the Department of Correction, or to any other place of confinement or detention of violators of the criminal laws of the State whenever such prisoner shall have served in confinement one fourth of such term or consecutive terms."

the reverse is not true, because it can be argued that the Defendant would be serving three times the length of his imprisonment normally required for parole on the larceny conviction if it were not concurrent.

The advice that counsel for the Petitioner received in reference to the Petitioner's criminal record, see Footnote 2 on Page 9 of his Supplementary Brief, is not only erroneous but extremely misleading. While the line is tenuous in Maryland, as in other jurisdictions, in determining the seriousness of a crime by classification as to misdemeanors, penitentiary misdemeanors and felonies, a cursory reading of Petitioner's criminal Record[6] would indicate that he has been convicted of three felonies, the most recent of which was affirmed by the Court of Appeals of Maryland on April 12, 1962. *Benton v. Maryland*, 228 Md. 309, 179 A. 2d 718. In addition, he has been convicted of four other crimes and is presently under indictment and awaiting trial in the United States District Court for the District of Maryland on a felony charge, to wit: uttering counterfeit securities, 18 U.S.C. 472. The Petitioner expresses the fear that his larceny conviction might be used by some future Judge to impeach his character. Keeping in mind that

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[6] The following is a resumé of Mr. Benton's convictions compiled from his Federal Bureau of Investigation record No. 1473 189, Metropolitan Police Department, Washington, D.C., and transcript of his present and previous cases:

Date	*Charge*		*Disposition*
4-1-38	Grand Larceny	Wash., D.C.	3-6 months
10-21-40	Robbery	"	6-18 months
8-19-41	Violation Parole	"	Parole Revoked
1-13-50	Contempt	"	$20.00 or 10 days
4-5-56	Petty Larceny	"	$50.00 or 30 days
3-6-58	Petty Larceny	"	$100.00 or 30 days
3-15-61	Grand Larceny	Maryland	5 years
2-21-64	Rogue & Vagabond	"	$100/c

if some Court in the future was to review his criminal record, it would also include his present burglary conviction (assuming that it is affirmed by this Court), it is sheer speculation that a fifth felony conviction would have any possible collateral legal consequences that four felony convictions plus his other convictions do not have.

It would also follow that it would be sheer speculation that this larceny conviction considered in conjunction with his four other felony convictions plus his other convictions, would have any independent "collateral legal consequences" as to (1) impeaching Petitioner's credibility should he choose to put it in issue at any future criminal trial. Article 35, Section 10, Annotated Code of Maryland; (2) affecting the judgment of a Court in sentencing should Petitioner again be convicted of a crime; (3) making him ineligible under municipal, State licensing laws;[7] (4) depriving him of the right to vote. Article I, Section 2 of the Maryland Constitution; (5) depriving him of the right to serve as a juror. Article 51, Annotated Code of Maryland.

Therefore, having negated the possibility of "collateral legal consequences" as a result of the larceny conviction, the "concurrent sentence doctrine" should be applied to the case at bar.

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[7] To secure the following licenses or to engage in the following professions a person must be of "good moral character, etc.".

Doctor	—Art. 43, Sec. 124, Anno. Code of Md.
Dentist	—Art. 33, Sec. 28, Anno. Code of Md.
Druggist	—Art. 43, Sec. 261, Anno. Code of Md.
Funeral Director or Embalmer	—Art. 43, Sec. 345, Anno. Code of Md.
Psychologist	—Art. 43, Sec. 629, Anno. Code of Md.
Detective Agency	—Art. 56, Sec. 78, Anno. Code of Md.
Real Estate Broker	—Art. 56, Sec. 220, Anno. Code of Md.
Home Improvement Business	—Art. 56, Sec. 258, Anno. Code of Md.

CONCLUSION

For the foregoing reasons the Respondent submits that the "concurrent sentence doctrine" enunciated in *Hirabayashi v. United States*, and subsequent cases does have continuing validity in light of the decisions in *Ginsberg, Peyton, Carafas* and *Sibron*.

Respectfully submitted,

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